

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

ROBERT R. NEWMAN,  
Petitioner,  
  
v.  
McEWAN (WARDEN),  
Respondent.

) NO. CV 12-9205-SJO (MAN)  
)  
)  
)  
) ORDER DISMISSING PETITION  
) AS SECOND OR SUCCESSIVE  
) AND DENYING A CERTIFICATE  
) OF APPEALABILITY  
)  
)

Petitioner, a California state prisoner, filed a habeas petition, pursuant to 28 U.S.C. § 2254, on October 25, 2012 ("Petition"). The Petition is the second habeas corpus petition filed by Petitioner in this Court stemming from his 2005 state court conviction and sentence.

Under the Rules Governing Section 2254 Cases in the United States District Courts, a habeas petition filed by a prisoner in state custody "must" be summarily dismissed "[i]f it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court. . . ." Rule 4, 28 U.S.C. foll. § 2254. For the reasons set forth below, the Petition must be, and is, DISMISSED as second or successive, pursuant to 28 U.S.C. § 2244(b).

**BACKGROUND**

On June 26, 2007, Petitioner filed a Section 2254 habeas petition in Case No. CV 12-9205-SJO (MAN) (the "Prior Action"). The Prior Action petition arose out of the same 2005 state court conviction on which the present Petition is based. The Prior Action petition asserted: two claims based on alleged prosecutorial misconduct during closing argument and in failing to promptly disclose a witness's statement; one claim based on the alleged ineffective assistance of trial counsel in failing to object to a detective's testimony; one claim alleging that due process was violated by the admission of evidence of Petitioner's earlier possession of a gun; and one claim alleging a due process violation based on the trial court's failure to continue the trial at Petitioner's request. During the pendency of the Prior Action, Petitioner filed an interlocutory appeal, which was dismissed on August 11, 2011, for lack of jurisdiction (Case No. 11-56149).<sup>1</sup> The Prior Action was resolved adversely to Petitioner on the merits, and habeas relief was denied by Judgment entered on July 8, 2011. Petitioner appealed, and on October 19, 2012, the Ninth Circuit denied a certificate of appealability (Case No. 11-56583).

The instant Petition alleges one or more claims challenging Petitioner's 2005 conviction. Only one claim is alleged within the form Petition itself, *i.e.*, that Petitioner's appellate and counsel provided ineffective assistance by failing to challenge the trial court's

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<sup>1</sup> Pursuant to Rule 201 of the Federal Rules of Evidence, the Court has taken judicial notice of its records and files, as well as the dockets for the United States Court of Appeals for the Ninth Circuit available electronically through the PACER system.

1 decision to admit into evidence a gun that a prosecution expert could  
2 not state, with certainty, was the murder weapon. (Petition at 5.) The  
3 various attachments to the Petition indicate that Petitioner may be  
4 asserting nine additional claims based on allegations that: gang  
5 membership evidence should not have been admitted; trial counsel  
6 provided ineffective assistance; witnesses provided perjured, "tainted,"  
7 and inconsistent testimony; the prosecutor committed misconduct; and two  
8 witnesses lacked credibility. A review of the dockets for the Ninth  
9 Circuit shows that Petitioner has not sought or obtained leave to file  
10 a second or successive Section 2254 habeas petition asserting any of the  
11 claims alleged in the instant Petition or, indeed, any claims at all.

#### 12 13 DISCUSSION

14  
15 State habeas petitioners generally may file only one federal habeas  
16 petition challenging a particular state conviction and/or sentence.  
17 See, e.g., 28 U.S.C. § 2244(b)(1) (courts must dismiss a claim presented  
18 in a second or successive petition when that claim was presented in a  
19 prior petition) and § 2244(b)(2) (with several exceptions not applicable  
20 here, courts must dismiss a claim presented in a second or successive  
21 petition when that claim was not presented in a prior petition). "A  
22 habeas petition is second or successive . . . if it raises claims that  
23 were or could have been adjudicated on the merits" in an earlier Section  
24 2254 petition. McNabb v. Yates, 576 F.3d 1028, 1029 (9th Cir. 2009).

25  
26 In those instances when Section 2244(b) provides a basis for  
27 pursuing a second or successive Section 2254 habeas petition, state  
28 habeas petitioners seeking relief in this district court must first

1 obtain authorization from the Ninth Circuit before filing any such  
2 second or successive petition. 28 U.S.C. § 2244(b)(3). The Ninth  
3 Circuit "may authorize the filing of the second or successive [petition]  
4 only if it presents a claim not previously raised that satisfies one of  
5 the two grounds articulated in § 2242(b)(2)." Burton v. Stewart, 549  
6 U.S. 147, 153, 127 S. Ct. 793, 796 (2007).

7  
8 By the Prior Action, Petitioner sought Section 2254 relief based on  
9 the same 2005 conviction at issue here, and his habeas petition was  
10 resolved adversely to him on its merits. His present challenge to the  
11 validity of his 2005 conviction does not rest on newly-discovered  
12 evidence or a new rule of constitutional law. Accordingly, the current  
13 Petition is second or successive within the meaning of Section 2244(b).<sup>2</sup>  
14

15 As Petitioner has not obtained permission from the Ninth Circuit to  
16 bring a second or successive petition, this Court lacks jurisdiction to  
17 consider the instant Petition. 28 U.S.C. § 2244(b); see also Burton,  
18 549 U.S. at 157, 127 S. Ct. at 799 (district court lacks jurisdiction to  
19 consider the merits of a second or successive petition absent prior  
20 authorization from the circuit court). Accordingly, IT IS ORDERED that:  
21 the Petition is DISMISSED; and Judgment shall be entered dismissing this  
22 action without prejudice.  
23

24 In addition, pursuant to Rule 11(a) of the Rules Governing Section  
25 2254 Cases in the United States District Courts, the Court has  
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27 <sup>2</sup> The instant Petition also appears to be substantially untimely  
28 given that Petitioner's limitations period commenced running in late  
June 2006, and likely expired in late June 2007.

1 considered whether a certificate of appealability is warranted in this  
2 case. See 28 U.S.C. § 2253(c)(2); Slack v. McDaniel, 529 U.S. 473, 484-  
3 85, 120 S. Ct. 1595, 1604 (2000). The Court concludes that a  
4 certificate of appealability is unwarranted, and thus, a certificate of  
5 appealability is DENIED.

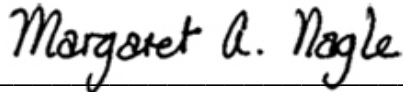
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7 IT IS SO ORDERED.

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9 DATED: November 2, 2012.

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11  
12 S. JAMES OTERO  
UNITED STATES DISTRICT JUDGE

13 PRESENTED BY:

14 

15 MARGARET A. NAGLE  
16 UNITED STATES MAGISTRATE JUDGE